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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MARGARITA LIGHTBOURN,
BURNS TAYLOR, OLIVIA SCHONBERGER,
GRANT DOWNEY, ANN LEMKE, and
DISABLED ABILITY RESOURCE ENVIRONMENT

Petitioners

V.

ANTONIO O. GARZA, Jr.,
SECRETARY OF STATE OF TEXAS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

When a State's chief elections officer fails to modify the election practices, policies, and programs which he administers, so that citizens with disabilities are not afforded an equal opportunity to enjoy the right to cast a secret ballot, does he violate Title II of the Americans with Disabilities Act?

Was the Fifth Circuit's incorporation of a virtual "intent-to-discriminate" requirement into Title II of the ADA, and rejection of the "effects" test contained in the Act, error and contrary to Congressional intent?

PARTIES TO THE PROCEEDINGS

The parties to this case are:

Petitioners: Margarita Lightbourn, Burns Taylor, Olivia Schonberger, Grant Downey, Ann Lemke, and the Disabled Ability Resource Environment (DARE).

Respondent: Antonio O. Garza, Jr., Secretary of State of Texas.

Counsel is unaware of any person or entity with a financial interest in the outcome.

Counsel in this case are:

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INTRODUCTION

For Texans with disabilities, the Fifth Circuit's judgment in this class action severely diminishes the most fundamental element of a representative democracy, the right to a secret ballot. The court's ruling subjects voters with disabilities, such as Petitioners, to "separate and unequal" status. That discriminatory treatment violates Title II of the Americans with Disabilities Act (ADA).

This Court would never tolerate the discrimination which the Court of Appeals sanctioned were it based on race or sex, and the Court should make it clear to the nation that it will not permit discrimination based on disability.

Petitioners turn to this Court for vindication of their legal rights, and their dignity. The Court's ruling in favor of Petitioners would protect the rights of blind voters throughout the country, and voters with disabilities. This case serves as the "guidepost" against which other courts will apply Title II of the ADA to the franchise for people with disabilities.

Petitioners respectfully ask the Court to breathe life into the promise which Congress made to Americans with disabilities that the long years of second-class citizenship and discrimination must come to an end.

The ruling below allows the Texas Secretary of State to deny blind and visually-impaired citizens the right to cast a secret ballot -- a fundamental constitutional right in Texas, like all other Texans. That ruling also guarantees the continuation of discrimination against citizens with mobility impairments, who face the barrier of physically inaccessible polling sites on election day. All that Petitioners seek is the same right and benefit that citizens without disabilities enjoy on election day. Nothing more.

The Secretary of State, as Texas' chief elections officer, plays a pivotal statutory role in elections held in Texas, at all levels. He has certain mandatory duties under the law to assure the functioning of voting by secret ballot. The Texas program

of voting by secret ballot is a program for ADA purposes.[1]

The Secretary has refused to reasonably accommodate Petitioners and the class members, and their disabilities, in the exercise of the secret ballot. As such, he discriminates against Petitioners and the class members. The ADA expressly prohibits this form of discrimination based on inaction.

The Secretary's most singular violation of the ADA is his refusal to assure that the new voting systems and voting system equipment are accessible to voters with disabilities. Texas law gives him the sole legal responsibility for certifying all voting systems or equipment used in Texas elections, except for simple paper ballots. Yet, he has made no effort to administer this program in compliance with Title II of the ADA.

The net result of the Secretary's ADA violation is that blind voters must tell another person how to mark their ballot for them. They cannot do it themselves, even though there are very simple and inexpensive adaptations that would allow blind voters to vote secretly.

This discrimination also flows as a natural consequence from the Secretary's failure to conduct the self-evaluation required by the ADA of that part of the state's voting system, which he administers, and of the effects of his policies and practices to determine if they cause discrimination, even unintentionally. A proper self-evaluation would have led the Secretary to change his methods of certifying election systems

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[1] The Court of Appeals never considered that a fundamental element of the right to vote in Texas is the secret ballot. This right is guaranteed by the state constitution, and delineated in Texas case law. The privacy component of the right to vote is critical, and it is what Petitioners sought to protect in this litigation. Ignoring this issue gave the appellate court greater flexibility in ruling as it did. Had it focused on the fundamental privacy right, its ADA analysis should have been substantially different.

so that they would accommodate voters with visual and physical disabilities.

The Secretary likewise failed to assure that the primary elections for political parties are held in compliance with the ADA, despite being, in essence, the sole funding source for the political primaries (currently $10-$12 million). Nor did he conduct an ADA self-evaluation in this regard. A self-evaluation surely would have compelled him to require the parties to utilize election processes that accommodate voters with disabilities.[2]

The Secretary also failed to conduct a self-evaluation process pursuant to 28 C.F.R §35.105(b) to measure whether other aspects of his election program, practices, or policies discriminate against voters with disabilities, and, if so, modify them to remove the discrimination.

For example, the Secretary did not adapt and modify the duties of his office to issue advisories and directives to include information about ADA compliance in elections.[3] Nor did he adapt his toll-free phone line to provide information for blind voters.

The Fifth Circuit put its stamp of approval on each of these discriminatory failures by the Secretary. Even worse, the Court

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[2] As with the privacy right, the Court of Appeals opinion also avoided this issue altogether, perhaps because the Secretary's ADA duties are so clear and direct on this point.

[3] The circuit did find that the Secretary "arguably breached" his duty to assure uniformity in the administration of elections statewide with regard to accessibility issues, but, nevertheless, the breach of "that duty ... could not have denied any benefit to plaintiffs." *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 432 (5th Cir. 1997) (Appendix A, A-21). The court offered no explanation of its logic, which actually seems counter-intuitive. Certainly, it would benefit to voterswith disabilities to have uniform voting practices.

of Appeals inserted a virtual "intent-to-discriminate" requirement into the ADA, substituting it for the "effects" standard clearly expressed and intended by the ADA. Such a ruling effectively guts Title II's prohibition against disability-based discrimination, generally and as it relates to voting.

This case is of national importance for it affects every disabled citizen's most cherished and fundamental right: the right to participate equally in democratic government. This is the very kind of right that Congress sought to protect in passing the ADA.

This case also has national impact because it radically revises the requirements that Title II imposes on state governments, effectively relieving them of any programmatic duties under the ADA.[4]

This Court should set aside the appellate ruling and reinstate the judgment of the district court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is in Appendix A. The findings of fact and conclusions of law by the District Court are in Appendix B; and its Final Judgment, in Appendix C.

JURISDICTION

The Court of Appeals filed its judgment on August 1, 1997, and overruled Petitioners' motion for rehearing on September 3, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

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[4] A very similar case is now pending in the U.S. Court of Appeals for the Sixth Circuit as to the Michigan Secretary of State's ADA duties with regard to blind voters. In that appeal, the United States has filed a brief in intervention, reflecting a position that is identical to that of Plaintiffs here. *King Nelson v. Candice S. Miller, in her official capacity as Secretary of State for the State of Michigan*, No. 97-1155 (U.S. Ct. of Appeals, 6th Cir.).

STATUTORY PROVISIONS INVOLVED

Title II of the ADA, 42 U.S.C. §§12131-12134; 28 C.F.R. §§35.105(a), 35.130(b)(1)(ii); Texas Election Code §§ 122.001, 122.031. These provisions are in Appendix D.

STATEMENT OF THE CASE

Proceedings Below

There are seven Petitioners, five of whom are blind voters in Texas. The sixth Petitioner has a severe mobility impairment, and the seventh is a private nonprofit group that assists and represents persons with physical and visual disabilities.

Petitioners originally filed this case as a class action against El Paso County and the local Republican and Democratic parties under Title II of the ADA and §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). Subsequently, El Paso County impleaded the Texas Secretary of State, and Petitioners then added him as a defendant as well.

Petitioners alleged that, in violation of the ADA and §504, the Secretary played a key role in the fact that polling sites and voting procedures throughout Texas were inaccessible to individuals with visual and mobility impairments. They claimed that the Secretary contributed to the denial of the same right to vote secretly to blind and visually-impaired voters, as enjoyed by others. They also alleged that the Secretary contributed to the existence of polling places in Texas that are inaccessible to voters with physical impairments.

The district court certified Petitioners to represent all Texas voting age citizens who are blind or mobility-impaired. The local Republican Party was dismissed, and El Paso County and the local Democratic Party settled with Petitioners,[5] leaving the

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[5] As discussed later in greater detail, the County adopted a very simple and inexpensive method of using a tape recording, a Walkman, and a plastic-like ballot overlay that allowed blind voters

Secretary as the sole defendant.

After the liability phase of the trial, the district judge found, *inter alia,* that: (1) the secret ballot is a fundamental constitutional right in Texas; (2) the Secretary is the chief elections officer for the state, on whom political subdivisions call for advice and who bears responsibility for assuring uniformity in the various voting systems used in Texas; (3) the the Secretary could accommodate voters with disabilities without affecting how non-disabled persons currently vote, that is, without fundamentally altering the nature of the vote for other citizens; and, (4) the Secretary was in violation of the ADA for not modifying his own duties and practices to accommodate voters with disabilities.

Following the remedy phase of the trial, the trial court issued its Final Judgment and crafted a remedy for the Secretary's ADA violations. The judge also found that: (1) the Secretary administered his licensing and certification system for Texas voting systems in such a way as to illegally discriminate against blind voters; (2) this occurred in part because the Secretary did not conduct a self-evaluation of that part of the voting program he administers for possible discriminatory effects as to mobility-impaired and blind voters; (3) even though, by law, the Secretary funds virtually all election expenses for political party primaries (currently $10-$12 million), he allows the parties to hold primaries at polling sites that are physically inaccessible and does not require use of a secret ballot adapted for blind voters; and, (4) one of the reasons this occurs is that the Secretary has not conducted a self-evaluation as to voters with visual and mobility impairments in primary elections.

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cast a secret ballot. The County also agreed to make sure that all its polling places were accessible.

One of the district judge's remedial orders required that, after December 31, 1996, the Secretary not approve any new voting system that was not ADA-accessible and did not preserve ballot secrecy for blind voters. He required the Secretary to distribute guidelines and instructions to manufacturers seeking approval of their voting systems that their systems be accessible to mobility-impaired and blind voters.

The district court did nothing more than require the Secretary to tailor his non-delegable mandatory election duties with those duties imposed on him by the ADA. The final order made it clear that it addressed "only those matters over which the Secretary has direct control." *Lightbourn v. Garza*, 928 F.Supp. 711, 716 (W.D. Tex. 1996) (Appendix C-10).

In essence, the trial court looked at those unique election functions which the Secretary performed, and found that, everything he did, he did wrong for ADA purposes. The reason for that was he had done nothing to comply with the ADA.

The Secretary appealed from this relatively mild order, with its generous deadlines for compliance, and the Court of Appeals reversed and rendered judgment for Secretary.[6]

Statement of Facts

The most striking fact in this lawsuit is that, until the settlement with El Paso County and the local Democratic Party, not a single polling place in Texas provided a means for a blind or visually-impaired citizen to cast a secret ballot. This was true despite the fact that the Secretary administers a licensing

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[6] The Court of Appeals also reversed, on other grounds, the district court's judgment in favor of Petitioners' §504 claim. Petitioners only bring forward their ADA claim inasmuch as prevailing on this claim accords them the same relief, if not more, as succeeding on the §504 claim. However, the fact that Petitioners had to seek relief under the ADA indicates the Secretary's longstanding lack of compliance with §504.

and certification system whereby he approves the voting systems or equipment to be used by election officials. Under Texas law, the Secretary is the sole approving authority for all voting systems used in the state. He has been approving, and continues to approve, voting systems that subject blind voters to discrimination on the basis of their disability.

Mobility-impaired citizens did not fare much better: the record showed widespread non-compliance throughout Texas with ADA physical accessibility requirements. Mobility-impaired citizens are impeded and discouraged from voting.

At trial, Petitioners presented three different surveys to show the geographical breadth of inaccessible polling sites. Data from the Federal Elections Commission, which the Secretary had gathered and forwarded to the FEC, pursuant to the Voter Accessibility Act for Elderly and Handicapped Persons,[7] showed 800 polling places around Texas to be physically inaccessible in some fashion.[8]

A second survey by Advocacy, Inc., of counties in Texas, using ADA Accessibility Guidelines (ADAAG),[9] showed that, of the 69 responding counties, 16 (25%) reported having inaccessible polling places (25% of the places in Tarrant County, where Fort Worth is located, for example, were inaccessible).

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[7] 42 U.S.C. §1973ee, *et seq.* (1984). This law, an amendment to the Voting Rights Act, concerned federal elections only, and not state and local elections; its reporting requirements expired in 1994.

[8] These surveys relied upon accessibility criteria from the Voter Accessibility Act, which are substantially narrower in scope and weaker than the ADA Accessibility Guidelines (ADAAG).

[9] 28 C.F.R. Ch. 1, Pt. 36, App .A. *See* Plaintiffs' Exhibits 3, 17 (trial exhibits and deposition transcripts are part of the appellate record, but are not numbered as part of the record).

This data, and the FEC data, is self-reported. Although this accounts for diminished reporting, it adds weight to the findings because they are admissions of possible ADA violations by the counties.

Third was a survey of all polling places in El Paso County by an elections judge, using ADAAG, which showed that 33% of the polling places were inaccessible in some fashion or another. These places lacked simple accessibility features like handicapped parking, ramps, and curb cuts.[10] If bathrooms wee taken into account, 85% (93 polling places) would be inaccessible. 8 ROA 395 (Record on Appeal).

Moreover, not one polling place in Texas provided a ballot mechanism by which a blind voter could cast a secret ballot. That occurred because the Secretary does not believe that the ADA requirement of making the secret ballot usable by blind voters applies to him.

Petitioners' testimony substantiated the class data. Carri George, Director of DARE Independent Living Center, using data from the United States Census and the Texas Commission on the Blind, testified that approximately 275,000 Texans are blind or have severe visual impairments. Ms. George also reflected on her expert knowledge that physical access and the lack of secret ballots was a concern to the disability community across Texas. 9 ROA 491.

Burns Taylor, who is blind, had voted in Travis County and El Paso County, but without a secret ballot. 8 ROA 307.

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[10] Testifying at the remedy phase of the trial, El Paso County elections administrator Helen Jamison agreed that, prior to settlement, many polling places in the county were physically inaccessible, but that polling locations (such as schools) had agreed to remedy the problems when approached by El Paso County, as required by the settlement with Petitioners. 10 ROA 829, 830-31.

Ann Lemke, who is also blind, had voted in Travis and El Paso Counties, and faced the same problems. *Id.* 391.

Olivia Schonberger, who is blind, had voted in Fort Worth and now votes in El Paso, but could not vote a secret ballot in either location. 8 ROA 262.

Frank Lozano, also blind, had voted in Dallas County and El Paso Counties. In Dallas, the situation was even more difficult for him because the crowd waiting to vote, while he was being assisted, was larger than what he experienced in El Paso. 7 ROA 114-15.

Mr. Lozano also pointed out that blind voters, even though they have no other physical disability, depend on ADAAG physical access standards to help with their mobility because of the impact that blindness has on their movement; issues of ramps, curb cuts, knowing how to navigate around bathrooms, and so on, are critical. 7 ROA 83.

Margarita Lightbourn, who has a severe mobility impairment and often uses a battery-powered chair, voted in various places in El Paso County. Everywhere, she encountered accessibility problems: lack of proper parking, curb cuts, and ramps, high voting booths not usable by people in wheelchairs, and the problem of having to wait in line for two hours and then use a bathroom that ultimately might not be accessible, as well as losing a place in line. 5 ROA 55.

Ms. Lightbourn pointed out the same infirmities infected Democratic primary conventions.[11] The Secretary's invocation of early voting did not resolve these issues because, as Mrs.

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[11] In Texas, party precinct conventions are held at the location of the primary elections, immediately upon closing of the polls. Thus, an inaccessible polling place for a primary election also would be inaccessible for the party precinct convention. *See* Tex. Elec. Code Ann. §§174.021, 174.022, 174.025, & 174.026 (Vernon 1993).

Lightbourn showed, early polling places had the same accessibility problems. *Id.* 53. Nor does early voting cure inaccessible party precinct conventions.

Robin Collins, attorney and representative for the El Paso County Democratic Party, recognized physical accessibility difficulties in polling places throughout El Paso County and East Texas, where he had practiced law for a number years. Often, the latter were worse than in El Paso. 8 ROA 422-23.

Mr. Collins, who helped conduct Democratic primary elections, said that the party never received information from the Secretary about choosing accessible sites, even though he routinely sent out information about other matters he deemed important. Nor did he ever suggest that the party do an ADA self-evaluation, or even mention the ADA in any mailout. Mr. Collins, as did other witnesses, indicated that directives from the Secretary would greatly affect access issues in all 254 counties in Texas. *Id.* 423-25, 439-40.

The humiliation and embarrassment felt by Petitioners is exacerbated on days of heavy voting when there are lines and confusion at the polling places. Mr. Lozano, for example, had great difficulty finding someone to read him the ballot bond issues and amendments, then asking that they re-read it so he could understand the issues before voting. 5 ROA 61-62; 7 ROA 81. His experiences were so bad that they discouraged him from voting for a number of years. 5 ROA 62; 7 ROA 90.

Some problems are worse. Ms. Schonberger described how polling officials were confused about dealing with her because she was blind. 8 ROA 262. Ballot amendments are difficult to understand because of the legal language; and she was nervous and humiliated by how much time it took for her to get a satisfactory reading and explanation, while the line built up behind her with impatient voters. *Id.* 268. Ms. Schonberger wants to read ballot information for herself. *Id.* 275.

Grant Downey, also blind, felt humiliated by the confusion caused when he asked people to help him to understand the ballot and that the polling workers made a big deal out of it his voting. *Id.* 311, 335-38. He had the same experience in virtually every place he voted. *Id.* 344. Ms. Lemke discussed her experiences as well and the demeaning and patronizing way in which poll workers would talk about helping her to vote, as if she were not there present. *Id.* 387.

Apart from this, the Texas constitutional right to secrecy enjoyed by voters does not accrue to current systems used by voters who are blind. For example, Ms. Lemke heard after voting that her preference was different from that of the person who helped her vote. This caused her to wonder whether her ballot had been marked as she had wanted and would have done, had the ballot been accessible to her. *Id.* 392.

Ms. Schonberger discussed the common complaint of blind voters that, when they have to tell a third person their choice for the ballot, it is virtually impossible for others not to overhear. That happened to her (*id.* 262), and Mr. Lozano (7 ROA 84).

One of the ADA's primary goals is to assure and protect the independence of persons who have disabilities. This is precisely where Petitioners focused. Mr. Taylor testified it was very important to him to function as independently as possible and that was why he wanted to cast a secret vote by an adapted ballot. 8 ROA 290-91. Mr. Lozano wanted the same ability so he could spend time studying a ballot issue or an amendment and then appropriately vote. 7 ROA 81.

Virtually everyone who testified indicated how important it was to be able to vote on the actual day of the general election because of last minute electoral shifts, and because issues become more focused a few days before the election. *See, e.g.*, 5 ROA 52 (M. Lightbourn); 8 ROA 285 (O. Schonberger). These are the same reasons that sighted voters generally wait,

rather than taking advantage of early voting opportunities.

The evidence was more than sufficient to convince the trial judge that substantial access barriers for Petitioners and class members existed throughout Texas, in violation of the ADA.

Although until their settlement with El Paso County and the local Democratic Party, no local or statewide program had implemented a system that permitted voters who are blind to cast a secret ballot, Petitioners proved the reason for this was not lack of technology, but lack of vision by public officials, who failed to see the simple technologies that could be readily adapted to accomplish secrecy of the ballot for blind voters.

Although considerable trial testimony occurred about creating accessible secret balloting systems for blind voters, Petitioners did not ask the court to order implementation of any system. Nor did the court do so. Rather, Petitioners offered the testimony to show that such systems were easily achievable. That meant the Secretary should apprise voting system manufacturers to develop their systems accordingly, if they wanted him to approve them. This also meant that he would have information at hand to advise local election authorities of the potential for adapting their current systems to bring them into compliance with federal law.

Adapting current balloting systems was so simple that Petitioners themselves designed two methods, and a variety of easy applications, to allow blind voters to cast a secret ballot.

The components of the El Paso system, which are typical of that used in other areas of Texas, comprise a portable plastic box-like container about 24" x 18", with an attached stylus, a punch card ballot, a set of pages with candidate/amendment information, and electronic counting system that collates, reads, and stores the ballots.

The punch card and candidate/amendment information pages are inserted into the top of the plastic container set on a

table inside the voting booth. The punch card insert is set underneath the candidate/amendment information so that the information corresponds to specific punch-out holes on the card. Immediately above the punch card are holes in a perforatable synthetic sheath through which the stylus punches out the appropriate part of the punch card corresponding to the ballot choices on the inserted card.

The first adaptation, devised by Petitioners Grant Downey and Burns Taylor, incorporated the candidate/amendment information onto a Braille printout, along with step-by-step instructions for use of the system. The Braille instructions corresponded exactly to the ballot choices on the inserted card, and instructed the user as to which holes, from top to bottom, matched each ballot choice.

With this simple adaptation, blind persons who read Braille may vote a secret ballot in like manner as sighted voters. Once a blind voter identifies the hole corresponding to the desired ballot choice, the voter uses the stylus to perforate the punch card below.

The principle underlying this simple adaptation has long been used by the blind community: what sighted persons can accomplish relying on the sense of sight, blind persons can often accomplish through the sense of touch.

However, the number of blind persons who can read Braille fluently enough to vote this way is limited. To solve this problem, Mr. Downey devised an easier and less expensive technique: use of a tape recording. The tape recording contains the same information as the Braille guide and is used with a cassette player and earphones (a "Walkman"). What the Braille adapted system accomplished through the sense of touch the tape adapted system accomplished through hearing and touch.

The end result, a punch card with holes, is deposited in the ballot box, indistinguishable from all other punch cards. The

overlay, used by a voter who is blind, created a secret ballot.

Mr. Downey reviewed three other voting systems commonly used in Texas: a method that electronically scans and counts paper ballots; a manually counted paper ballot system; and a lever machine.

He built a prototype for paper ballot systems,[12] using a three dimensional template into which the paper ballot is inserted. The template has holes that correspond to the choices on the paper ballot which can be identified by blind voters by touch. The voter uses a pencil to fill in the hole marking his/her ballot choice. Candidate/amendment information is conveyed by a tape cassette, as with the punch card system.

Mr. Downey testified, and the Secretary's expert Robert Peters agreed ("piece of cake"), that lever machines adapt even easier than paper ballot systems. Lever machines are three dimensional and merely need candidate/amendment information taped on the machine with a Walkman as a guide.

El Paso County adopted the tape-adapted system in its settlement and used it in the last general election on November 5, 1996, throughout the county.

Petitioners, by designing and inventing voting systems that preserve secrecy for voters who are blind, showed the possibility of easily achievable alternatives.[13] It took Mr. Downey two and one-half hours to figure out how to combine a Walkman and a tape along with an overlay. This showed how easy and inexpensive it was to adapt the ballot for blind voters. 8 ROA 324. The Secretary never explained why he couldn't do the same.

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[12] The Secretary's expert Robert Peters agreed that the system designed by Mr. Downey was workable

[13] Mr. Downey testified that he could modify his system to allow for write-in votes, and he did. 10 ROA 800-01.

The issue, however, is not the competency of the Petitioners' adaptations or inventions; it is the Secretary's failure to comply with the ADA. The El Paso method of accommodating blind voters shows how simple, inexpensive, and "low tech" the adaptation is; and it demonstrates how easy it would be for the Secretary to insist on the same simple mechanisms before he approves a voting system submitted to him for approval.

The Court should shake the Secretary from his slumber; he must stop certifying voting systems until they become accessible to voters with disabilities. Until he stops doing so, the Secretary is violating the ADA.

REASONS FOR GRANTING THE WRIT

1. This Court should correct the Fifth Circuit's decision that a state's chief elections officer has no legal duty under the ADA to modify his election practices and procedures so that citizens with disabilities are afforded an equal opportunity to cast a secret ballot.

The Court of Appeals incorrectly decided that the Secretary had no duty under either Texas law or the ADA to take steps to ensure that local election officials comply with the ADA. This holding stems from the premise that "the ADA is not an election law." *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 430, 432 (5th Cir. 1997).

That the ADA is not an election law is irrelevant and a legal red herring. The opinion is not clear what an "election law" is, perhaps a law that regulates the election process. However, by frmaing the issue this way, the appellate opinion misses the point: the ADA does apply to elections, just as it applies to all facets of government programs. The ADA requires accessibility modifications in a state's voting program.

Moreover, the Court of Appeals incorrectly stated that Petitioners used this lawsuit to ensure that local officials comply with the ADA. Petitioners only attempted to compel

the Secretary to do what the ADA required of him, nothing more and nothing less. As noted already, the district judge carefully tailored his final judgment in that respect, recognizing that his order would have a beneficial "trickle down" effect:

> ...the Court has jurisdiction only over the Secretary in this case. Therefore, only those matters over which the Secretary has direct control are addressed. The ruling of this Court does not directly burden local election officials. However, the Court does acknowledge that, as in many other cases, changes at the top will work changes at the bottom. This holding will, among other things, remove a major impediment to a local voting authority seeking to comply with the ADA, namely the failure of the Secretary to approve an ADA-compliant system. *Lightbourn v. Garza*, 928 F.Supp. at 716 (Appendix C-12).

As noted in the next section, Title II of the ADA, and its regulations, certainly contemplate the joint administration of certain government programs by different agencies and officials. Such is the case with regard to voting in Texas. Bringing one agency or official into compliance with the ADA, one step at a time, has an ameliorative effect on the entire program. That is what Petitioners sought here. They wanted to make the secret ballot accessible,[14] and began with the pivotal figure in that scheme. All they wanted of the Secretary was that he modify

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[14] It is a fundamental constitutional right under Texas law to cast a secret ballot. *Wood v. State ex rel. Lee*, 126 S.W.2d 4 (Tex. 1939) (upholding constitutionality of voting machines because they "accorded a secret ballot" to voters, as guaranteed by state constitution); *Carroll v. State*, 61 S.W.2d 1005, 1007-08 (Tex. Crim. App. 1933) (mandate of Tex. Const. Art. VI, §4, that elections be by ballot construed to mean by secret ballot). *Cf. Oliphint v. Christy*, 299 S.W.2d 933 (Tex. 1957) (qualified voter may not be compelled by court order to disclose secret ballot in election contest).

his own non-delegable, mandatory election duties under Texas law to accommodate those voters with visual and physical disabilities.

By its plain terms, Title II's general prohibition of discrimination applies to discriminatory election practices.[15] Indeed, that "prohibition applies to anything a public entity does." 28 C.F.R. Part 35, App. A §35.102.[16]

While the ADA may not be an election law per se, it does apply to voting and elections, and Congress clearly intended that it do so. The ADA's statement of findings, 42 U.S.C.

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[15] The Fifth Circuit mistakenly relied on *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), for finding that the violations alleged by Petitioners could not be attributed to the Secretary. *Bush* held that the Texas Jail Standards Commission has no state-created duty to enforce Fourteenth Amendment jail standards in county jails throughout the state as part of its own minimum jail standards. In other words, the circuit would not read Fourteenth Amendment standards into Texas statutory minimum jail standards. However, if Congress decides in the exercise of its Fourteenth Amendment powers to do so, it could pass a statute requiring that such be done with regard to jail conditions. It simply has chosen not to do so.

With passage of the ADA, however, Congress chose to require that certain minimum standards apply throughout state agencies to individuals with disabilities. The ADA applies to the Texas Commission on Jail Standards, and it applies to the voting programs and practices that the Secretary administers.

The Court of Appeals misread *Bush* as controlling the ADA. Congress, however, intended the ADA to override and overcome the very problem created by *Bush*, and to assure that federal standards apply as to individuals with disabilities.

[16] *See also Innovative Health Systems, Inc. v. City of White Plains*, 931 F.Supp. 222, 232 (S.D.N.Y. 1996) (finding "nothing in the text or the legislative history of the ADA to suggest that ... any other governmental activity was excluded from its mandate"); H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 84 (1990) (Title II applies "to all actions of state and local governments").

§12201(a)(3), singled out "voting" as one of the "critical areas" in which "discrimination against individuals with disabilities persist." The Senate Report accompanying the Act quoted the testimony of Illinois's Attorney General, who "focused on the need to ensure access to polling places: 'You cannot exercise one of your most basic rights as an American if the polling places are not accessible.'" S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989). The issue of voting accessibility also arose in the floor debates. *See* 135 Cong. rec. S10753 (1989) (remarks of Senator Gore) ("As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens."); 135 Cong. Rec. S10793 (1989) (remarks of Sen. Biden).

The Fifth Circuit's opinion in this case severely weakens the strong action taken by Congress to end disability-based discrimination in voting -- the passage of the ADA.

Title II provides, without qualification, that "no qualified individual with a disability shall, by reason of such disability, be excluded form participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

On its face, Title II reaches any state action that subjects persons with disabilities to discrimination as defined in ADA regulations. By this measure, the Secretary's certification and approval of inaccessible voting systems -- part of a program or activity of his office -- discriminates against blind voters and violates the ADA. The same goes for the Secretary's funding of political party primaries that use inaccessible places and equipment.

a. The Secretary has failed, and continues to fail, to assure that new voting systems or voting system equipment used in Texas elections are accessible to voters with disabilities.

The Secretary has the ultimate say in the approval and use of voting systems and voting system equipment in Texas. Section 122.031 of the Texas Election Code provides that: "[b]efore a voting system or voting system equipment may be used in an election, the system and unit of the equipment must be approved by the secretary of state...." Tex. Elec. Code Ann. §122.031 (Vernon 1997). *See id.* §122.038 (Secretary shall approve system or equipment that satisfies applicable requirements of approval).

Counties that purchase voting systems or equipment must select them from a list approved by the Secretary (or they may develop their own system, which the Secretary must then approve). At time of trial, the Secretary's list contained approximately twenty-seven (27) approved systems, none of which afforded blind voters an equal opportunity to cast a secret ballot and few of which accommodate voters with physical disabilities.

The Fifth Circuit erroneously construed Petitioners' argument to be that §§122.031 and 122.038 oblige the Secretary to approve voting systems or equipment that ensures a secret ballot for blind voters. It is Title II, rather, that obliges the Secretary to not deny the benefits of the services, programs, or activities of his office to individuals with disabilities on the basis of their disability.[17] Sections 121.031 and 121.038,

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[17] The Fifth Circuit wondered where in §§122. 031 and 122.038 Petitioners found "this expansive duty" to approve equipment that provides for a secret ballot for blind voters. *Lightbourn*, 118 F.3d at 4553. Petitioners find it in the plain language of Title II.

however, do delineate a mandatory program or activity of the Secretary. As such, this program -- the certification and approval of voting systems -- must be made accessible to voters with disabilities in accordance with Title II.

The Texas Election Code sets out the eleven criteria that the four commissioners must use in recommending the Secretary's approval of a voting system. *Id.* at §122.001. The first on the list is assurance of secret balloting. The ADA dovetails perfectly with this criteria since Petitioners invoked the ADA to achieve that very benefit, and constitutional right.

Although having the duty and power to do so, the Secretary never developed or promulgated any ADA criteria to assure that voting systems, which he approves, are accessible to persons with disabilities, and that secret balloting is afforded to visually-impaired voters. Tom Watson, one of the four examiners, appointed by the Secretary to recommend approval of voting systems tohim, stated there was no problem with setting up appropriate ADA criteria -- all the examiners needed was the Secretary's fiat. Watson Deposition 46-47. But that never came.

Nor did the examiners receive any information or training about the ADA from the Secretary. Thus, they never asked any voting systems or equipment manufacturers about physical access issues or secret balloting for blind voters. *Id.* 10, 14, 18, 22. Had there been criteria or instructions, the examiners would have insisted on such features. Market forces would then take over and access features would be built into the voting systems.

The court also misconstrued what the Petitioners sought from the Secretary: they did not, as the court wrote, seek to "oblig[e] the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters." *Id.* Rather, they simply requested that the Secretary not certify equipment that failed to provide blind voters the opportunity to cast a secret ballot.

Id. 15. It would not be an undue burden to require ADA accessibility as part of approving voting systems. *Id.* 39-40.

Because none of the systems approved by the Secretary is accessible to blind voters, and because many of them have inaccessible features for voters with physical disabilities (such as high voting booth counters), the Secretary places Texas counties in a legal bind. The counties must purchase their voting systems or equipment from the Secretary's list, but the list only contains inaccessible choices. The counties, then, must violate federal law by using the list. If, however, the Secretary administered his program in compliance with Title II, he could only approve ADA-accessible voting systems or equipment, thereby releasing the counties from the legal trap in which he has placed them.

b. The Secretary failed to assure that primary elections which he funds are held in compliance with the ADA.

The Court of Appeals did not speak to this point, perhaps because there is no way of excusing the Secretary's non-compliance with the ADA in this matter. He is virtually the sole funder of party primaries, which makes his corresponding ADA duties even more enhanced.

The Secretary has joint responsibility with local officials for caring out elections; the degree of responsibility varies according to the type of election. 9 ROA 637. In party primaries, his role, as the principal funding source and sole source of approval for any relocation of polling sites away from those already approved for county use, is expansive. *See* Tex. Elec. Code Ann. §43.034 (Vernon 1986). As such, his ADA responsibilities are correspondingly greater.

The ADA clearly imposes liability on the Secretary in this instance:

> A public entity, in providing any aid, benefit, or service, may not, directly or through contractual,

licensing or other arrangements, on the basis of disability ....

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. 28 C.F.R. §35.130(b)(1)(ii)

A voting system is an aid, benefit, and service that permits voters to cast a secret ballot. The Secretary controls the use of voting systems and equipment by party officials through his certification process. He also pays approximately 90% of the primary elections costs ($10-$12 million) through contracts with political parties and local elections officials, who in turn must use a voting system he has approved, none of which assure a secret ballot for blind voters. 9 ROA 657.

The Secretary has not imposed any conditions for the political parties to assure ballot accessibility. Nor has he required or suggested that the parties, as a condition of receiving primary funds from him, familiarize themselves with the ADA and assure accessible polling places. *See id.* 672. Although he routinely mails information to political parties about conducting primaries, he has never included ADA material. He is in violation of the ADA.

c. This Court should correct the Fifth Circuit's decision that the Secretary has no duty under the ADA to conduct a "self-evaluation" of the services, policies, and practices he administers concerning voting systems or equipment used in Texas elections.

One of the chief reasons for the Secretary's breach of his ADA duties is that he never conducted a self-evaluation to measure his level of compliance with the ADA.

Section 35.105 requires that a public entity "shall, within one year of the effective date of this part [January 26, 1992], evaluate its current services, policies, and practices, and the

effects thereof, that do not or may not meet the requirements of this part and, to the extent that modifications of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications." 28 C.F.R. §35.105(a).

Although this regulatory language is plain, comprehensive, mandatory, and proactive, the Fifth Circuit eviscerated this legal duty by holding that §35.105 "merely" required the Secretary to evaluate his department, and not his services, practices, and policies, and the effects thereof. *Lightbourn*, 118 F.3d at 432. This ruling is plainly wrong.

This court's exceedingly narrow reading of §35.105 goes against the plain language of the regulation. The regulation's breadth is sweeping, covering all services and practices of the Secretary. This surely includes the Secretary's approval of voting systems and equipment for use in Texas elections, as well as his funding of the party primaries.

The Secretary approves voting systems or equipment that is not in compliance with the ADA, and accordingly discriminates against voters with disabilities by denying them an equal opportunity to vote a secret ballot. This discrimination, which the ADA sought to cure, went undiscovered because the Secretary failed to perform a self-evaluation. The duty imposed on him to remove discrimination discovered through the self-evaluation process is mandatory,[18] with very narrow exceptions (e.g. "undue burden").

Contrary to the Fifth Circuit's opinion, the Secretary has a mandatory duty under the ADA to evaluate and explore,

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[18] *See* 28 C.F.R. §35.130; *and see Tyler v. City of Manhattan*, 849 F.Supp. 1429 (D.Kan. 1994) (city liable for conducting ADA self-evaluation of all programs, services, and facilities and consulting with disability community).

through all means reasonably available, solutions to the discrimination faced by blind voters. He simply never undertook that process, and violated federal law, with severe adverse consequences for voters with disabilities.

d. The Secretary failed to consult with the disability community as part of the self-evaluation process.

Section 35.105 mandates that interested persons with disabilities, and representative organizations, participate in the self-evaluation process. 28 C.F.R. §35.105(b)&(c). The Secretary, however, never contacted any such individuals on behalf of blind voters. He failed to even involve the Texas Commission of the Blind, the agency designed to assist persons with severe visual impairments, and which has a mailing list of 25,000 people. Had the Secretary fulfilled his §35.105 duty, he would have discovered the discriminatory practices of his office, most notably the approval of inaccessible voting systems and equipment and inaccessible party primaries.

e. The Secretary failed to adapt and modify the advisory functions of his office.

Tom Harrison, the Secretary's deputy for elections, testified that the Secretary has the obligation to provide counties information about their legal responsibilities and inform them of what the ADA requires. 8 ROA 423, 638; Tex. Elec. Code Ann. §31.003 (Vernon 1993).

The counties rely on, and comply with, the Secretary's advice because of budgetary constraints, his expertise, the desire and need for uniformity, and because he is the chief elections officer by law. The counties depend on him for guidance in compliance with both state and federal law.[19]

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[19] *E.g.*, 10 ROA 766-67 (El Paso County Attorney); *id.* 832, 836 (El Paso County elections administrator); 11 ROA 1082-83, 1091 (Harris County elections administrator). The Harris County admi-

Nevertheless, the Secretary never advised counties they should conduct ADA-accessibility surveys, although he had considerable knowledge about the lack of accessibility around the state by virtue of the reporting done between 1985 and 1994 under the Voter Accessibility Act. 8 ROA 618-20, 622-23, 640.

Ann McGeehan, Mr. Harrison's successor, admitted the Secretary could mail out ADA information and evaluations for the counties to use, but did not do so. 10 ROA 957, 962.

f. The Secretary failed to issue directives to foster ADA compliance in Texas elections.

Ms. McGeehan acknowledged the Secretary has the duty to issue directives to local elections officials as to compliance with laws that affect the franchise (10 ROA 881). Yet, he never did so with regard to the ADA.[20]

g. The Secretary failed to adapt toll-free phone numbers and available information for blind voters.

The Secretary operates an 800 toll-free telephone number for information about elections and voting. Although it would be easy to provide a tape recording about ballot propositions, like constitutional amendments, and statewide candidates for blind voters to access through the 800 number, the Secretary never considered this service. *Id.* 589, 680. And he never suggested to counties that they set up an audio-tape system for blind voters in local elections (8 ROA 594), although he easily could have done so (10 ROA 977).

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nistrator said he would comply with any suggestion from the Secretary to do an ADA self-evaluation, set up an advisory group from the disability community, and adapt his voting system. 11 ROA 1082-83, 1091.

[20] Robin Collins testified for the Democratic Party that directives from the Secretary would affect ADA compliance for the better in voting in all 254 Texas counties. 8 ROA 439-40.

The Secretary never considered modifying his public service announcements to direct PSA's to voters with physical or visual disabilities (8 ROA 591-92, 646), although he easily could do so. 10 ROA 934.

Moreover, the Secretary never prepared ballot instructions or voter information in Braille or large print for statewide candidates or ballot propositions, even though large print is easily created, Braille printers are available for word processors, and audio tapes are easily duplicated. 10 ROA 869-70. Had he done this, he would have served 90%-95% of voters with visual impairments. 8 ROA 292-93.

2. This Court should correct the Fifth Circuit's erroneous incorporation of a virtual "intent-to-discriminate" requirement into the ADA. The proper inquiry is whether the public entity's services, policies, and practices, and the effects thereof, discriminate against individuals with disabilities.

The most striking assertion of the Fifth Circuit's opinion was the Court's effective incorporation, in direct conflict with the ADA's express text, of an intent-to-discriminate requirement into the Act. No such requirement exists, and the incorporation of such radically changes a plaintiff's burden in advancing a discrimination claim under Title II. Such an intent requirement turns the ADA on its head, and defeats Congress's efforts to remove disability discrimination from our governmental institutions and society as quickly as possible.

The Court of Appeals, as already discussed, misconstrued Petitioners' argument to be that §§122.031 and 122.038 of the Election Code obligated "the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters" ....

> The [Petitioners'] assertion that a voting machine for blind voters exists does not prove that the Secre-

> tary violated the ADA because the [Petitioners] do not allege -- let alone prove -- that they presented any voting machine to the Secretary or that he failed to approve such a machine. Perhaps the [Petitioners] could state a claim under Title II of the ADA if they demonstrated that the Secretary wrongly refused to approve such equipment after it was presented to him for approval. *Lightbourn*, 118 F.3d at 431.

Title II does not, however, require that a plaintiff demonstrate that a public entity intended to pay no heed to the plaintiff. Instead, Title II imposes on a public entity the mandatory duty to "evaluate its current services, policies, and practices, and the effects thereof" to determine which are discriminatory, and then "proceed to make the necessary modifications" to eliminate such discrimination. 28 C.F.R. §35.105(a). The Secretary did not do this, and the Fifth Circuit approved of his non-compliance with the ADA.

Whether a public entity intended to discriminate by non-accommodation is of no import under the ADA. The only inquiry is whether the entity's services, policies, and practices, and effects thereof, result in discrimination against individuals with disabilities. Petitioners met this burden: the Secretary's practices -- the systematic approval of inaccessible voting systems and equipment and funding inaccessbile party primaries -- deny voters with visual impairments the right to cast a secret ballot. This is the extent of Petitioners' burden, nothing more.

To require Petitioners to show that the Secretary intentionally refused to accommodate them is to impose a burden that Congress carefully avoided creating. This Court must correct the Fifth Circuit's reading of the ADA

Moreover, the appellate bench ignored Title II regulations, namely:

(3) A public entity may not, directly or through contractual or other arrangements utilize criteria or methods of administration:

(i) That have the *effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability [emphasis added].

28 C.F.R. §35.130(b)(3)(i).

Title II should be read in harmony with Title I of the ADA, which, as the employment provision of the ADA, defines "discriminate" as "utilizing standards, criteria, or methods of administration ... that have the *effect* of discrimination on the basis of disability...." 42 U.S.C. §12112(b)(3)(A) (emphasis added).

Congress clearly intended the ADA to undo the effects of discrimination as part of the purpose of the Act "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." *Id.* §12101(b)(1). The discrimination that Congress sought to remedy through the ADA was the kind born more out of ignorance than ill will.

The ADA does not have an intent requirement, as does standard Fourteenth Amendment litigation. Perhaps the latter jurisprudence led the appellate court into error. Rather, the ADA is remedial in nature and more closely akin to Title VII employment law[21] and the Voting Rights Act (42 U.S.C. §1973).

The Court of Appeals incorrectly refused to find the effects of discrimination against voters with disabilities, caused by the Secretary's non-compliance with the ADA, illegal.

The circuit court erred on this point as well.

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[21] 42 U.S.C. §2000a *et seq.* *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct 849, 28 L.Ed.2nd 158 (1971).

CONCLUSION

The Court of Appeals grievously misconstrued Title II of the ADA. The court denied blind voters the right to a secret ballot and took away the guarantee that voters with mobility disabilities would have access to their polling places.

Not only did the Fifth Circuit undermine the right of voters to disabilities to cast a secret ballot on election day, but the court dramatically rewrote the ADA, standing it on its head, so the persons with disabilities can not find remedy against their government unless they can show an intent to discriminate. Moreover, the appellate panel failed to apply the plain language of the ADA to the Secretary's duties.

The Court of Appeals undercut the remedial purpose of the ADA, and thwarted Congressional intent. Unless this Court corrects the opinion blow, and restores judgment to Petitioners, the Fifth Circuit opinion will affect adversely voters throughout the circuit, and very likely throughout the nation.

The Fifth Circuit's opinion is as solid a barrier to voters with disabilties as the physical obstacles they encounter daily.

Because of the national impact of this case and its grave injustice to voters with visual and physical disabilities, Petitioners pray that the Court grant this petition for certiorari.

December 2, 1997.

Respectfully submitted,

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Marguerite LIGHTBOURN; Burns Taylor;
Olivia Schonberger; Grant Downey; Ann Lemke;
Disabled Ability Resource Environment,
Plaintiffs-Appellees,
v.
COUNTY OF EL PASO, TEXAS;
Republican Party of El Paso County;
Democratic Party of El Paso County, Texas;
Antonio O. Garza, Jr., Secretary of State of Texas,
Defendants,
Antonio O. Garza, Jr., Secretary of State of Texas,
Defendant-Appellant.
No. 96-50564
118 F.3d 421
United States Court of Appeals, Fifth Circuit.
Aug. 1, 1997.

Appeal from the United States District Court for the Western District of Texas.

Before JOLLY, DUHE and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Antonio O. Garza, Jr., the Secretary of State of Texas, appeals the district court's order finding him in violation of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, and requiring him to undertake certain remedial actions.

We reverse and render judgment for the Secretary.

I

The plaintiffs are five blind residents of El Paso, Texas, one mobility- impaired El Paso resident, and a private nonprofit group that aids disabled persons. They sued El Paso County ("El Paso") and the local Republican and Democratic parties under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794

("§504"), and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12131-12134. Subsequently, El Paso impleaded the Secretary, and the plaintiffs also added him as a defendant.

The plaintiffs alleged that the defendants discriminated against them by failing to ensure that persons with visual and mobility impairments have access to "polling sites and voting procedures." Specifically, the blind plaintiffs asserted that the voting equipment available at their polling places only permitted them to vote with the assistance of an election worker or other person, and the ***424** defendants had not taken steps to ensure that they could vote with complete secrecy.[1] Thus, they contended, the defendants violated §504 and the ADA. In addition, the wheelchair-bound plaintiff maintained that she had trouble locating a parking space next to and using the restroom facilities at her polling place. She asserted that the defendants breached their obligation to ensure that polling places are accessible to handicapped voters and hence violated §504 and the ADA.

The district court granted the plaintiffs' motion for class certification of all Texas citizens of voting age who are blind or severely mobility-impaired. The district court then granted the local Republican Party's motion to dismiss and denied the Secretary's motion for summary judgment. The plaintiffs settled their claims against El Paso and the local Democratic Party, leaving the Secretary as the sole defendant in this lawsuit.[2]

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[1] Texas Election Code §64.031 provides that a "voter is eligible to receive assistance in marking the ballot ... if the voter cannot prepare the ballot because of a physical disability that renders the voter unable to write or see...."

[2] The plaintiffs aver that as part of their settlement with El Paso County, the county tested and used a template/tape recording system

After a bench trial, the district court made several findings in a written opinion. The court initially observed that Texas law provides a right to a secret ballot for all voters. The court found that the burdens the state alleged it would suffer if compelled to ensure blind voters a completely secret ballot were "speculative." To the contrary, the district court concluded that the Secretary could accommodate blind (as well as mobility impaired) voters without affecting the voting methods of non-disabled persons. The district court also determined that the Secretary was a "public entity" subject to §504 and the ADA, and that he is responsible for ensuring "uniformity in the various voting systems in use throughout the state." The district court ultimately concluded that "[t]he system of voting in the State of Texas" violates the ADA.[3]

After the subsequent remedies phase of the trial, the district court issued supplemental findings of fact and conclusions of law and crafted a remedy for the §504 and ADA violations it discovered. The court found both that the Secretary has a duty to ensure that local election authorities comply with Title II of the ADA, and that "[t]he Secretary has joint responsibility with the state's local election authorities in assuring compliance with the ADA and Section 504 in conducting elections." The court also determined that the Secretary had failed to take several possible actions to remedy discrimination against blind or

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in its general elections in November 1996 which enabled blind voters to vote in secrecy. It is unclear whether the Secretary approved this voting system. *See* Tex.Elec.Code §122.031 ("Before a voting system or voting system equipment may be used in an election, the system and a unit of the equipment must be approved by the secretary of state....").

[3] The district court's opinion does not specify whether it found that "[t]he system of voting in the State of Texas" also violates §504.

mobility-impaired voters, such as encouraging the development of voting systems that enable blind voters to vote with complete secrecy. The court found that statutory methods of assisting blind persons to vote both abridge the right to a secret ballot and cause "embarrassment and sometimes humiliation." With respect to mobility-impaired voters, the court determined that the evidence before it indicated "widespread non-compliance throughout Texas" with the physical accessibility requirements of §504 and the ADA. Finally, the court concluded that modification of "the current policies, practices, and procedures that result in the denial of the secrecy of the ballot for blind voters would not cause a fundamental alteration in the nature of the State's voting program."

The district court ordered extensive and detailed remedial measures to effect its "intention to have an ADA-compliant voting system in place for the next national election in the year 2000." The court emphasized that "only those matters over which the Secretary has direct control are addressed [in the remedial order]." First, the district court ordered that after December 1, 1996, the Secretary approve only voting systems ***425** that comply with the ADA and that enable blind voters to vote in total secrecy. Second, the court ordered the Secretary to issue directives, guidelines and instructions based on the ADA and its implementing regulations and distribute them to local election authorities within eighteen months of the court's order. The directives, guidelines and instructions must state that: (1) voting systems purchased after December 31, 1997 must be accessible to blind and mobility-impaired voters and ensure a secret ballot for blind voters; (2) by December 31, 1998, current voting systems must be modified to be accessible to blind and mobility- impaired voters and ensure a secret ballot for blind voters; and (3) by December 31, 1999, all voting systems must be modified to be accessible to blind and

mobility-impaired voters and ensure a secret ballot for blind voters. The district court ordered the Secretary to submit the directives, guidelines and instructions to it for review. The court further instructed the Secretary to "devise a system of systematically monitoring" §504 and ADA compliance by local election authorities and to compile a detailed report regarding compliance to be "delivered, on the anniversary date of this Judgment, to the Court throughout the duration of this Judgment." Last, the district court directed that it would retain jurisdiction over the judgment for enforcement purposes. The Secretary appeals.

II

The Secretary presents three arguments on appeal. First, he contends that the district court improperly certified the plaintiffs to represent all Texas citizens of voting age who are blind and severely mobility-impaired. Second, he argues that the plaintiffs cannot state a claim against him under §504. Third, he asserts that the district court erred in holding that he violated the ADA by breaching a duty to ensure that local election authorities comply with the ADA. We address each argument in turn.

A

The Secretary initially contends that the district court improperly certified the plaintiffs to represent all Texas citizens of voting age who are blind or mobility-impaired. He maintains that class certification was improper because none of the plaintiffs has voted outside of El Paso since enactment of the ADA, the plaintiffs have settled their claims against El Paso, and the punch-card voting system used in El Paso differs from the paper-ballot voting system used in many Texas counties.

The district court did not make any specific findings of fact with respect to the plaintiffs' class certification motion. The district court did, however, specifically find that the plaintiffs

met the prerequisites of Federal Rule of Civil Procedure 23(a) and (b)(1) and (2).[4] The district court has wide discretion in deciding whether to certify a proposed class. *McGrew v. Texas Bd. of Pardons & Paroles*, 47 F.3d 158, 162 (5th Cir.1995). Assuming that the court considered the Rule 23 ***426** criteria, we may reverse its decision only for abuse of discretion. *Id.*

The Secretary does not dispute the numerosity and adequacy of representation elements of Rule 23(a). In addition, Rule 23(b)(2) clearly applies to this case because the Secretary

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[4] Rule 23 provides in relevant part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole....

Fed.R.Civ.P. 23.

has "acted or refused to act" on grounds generally applicable to the class. Hence, we need only address whether the plaintiffs satisfy the commonality and typicality elements of Rule 23(a).

The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members. *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir.1993). Several such issues exist in this case, including whether the Secretary violated §504 or the ADA by failing to direct local election officials to enforce these statutes. Furthermore, allegations of similar discriminatory practices generally meet the commonality requirement. *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir.1993). The plaintiffs here allege that the Secretary similarly discriminated against all class members by failing to direct local election officials to comply with §504 and the ADA. Thus, the plaintiffs satisfy the commonality requirement for class certification.

The test for typicality, like the test for commonality, is not demanding. *Forbush*, 994 F.2d at 1106. Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent. *Flanagan v. Ahearn* (In re Asbestos Litig.), 90 F.3d 963, 976 (5th Cir.1996). In the event the class members in this case were to proceed in a parallel action, they would advance legal and remedial theories similar, if not identical, to those advanced by the named plaintiffs. Thus, the plaintiffs also satisfy the typicality requirement for class certification. Accordingly, we determine that the district court did not abuse its discretion in granting the plaintiffs' motion for class certification.

B

The Secretary next argues that the plaintiffs cannot state a claim against him under §504 of the Rehabilitation Act of 1973

because he does not receive financial assistance from the federal government. In determining that the Secretary violated §504, the district court made no finding regarding the Secretary's receipt of federal financial assistance. The plaintiffs maintain that the general receipt of federal funds by the State of Texas brings the Secretary within § 504.

We review the district court's conclusions of law de novo, *Chandler v. City of Dallas*, 958 F.2d 85, 89 (5th Cir.1992), *cert. denied*, 511 U.S. 1011, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994), and its factual findings for clear error. *Henderson v. Norfolk S. Corp.*, 55 F.3d 1066, 1068 (5th Cir.1995).

The Rehabilitation Act provides that "[n]o otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." 29 U.S.C. §794(a) (emphasis added). Section 794(b) defines "program or activity" as:

> all of the operations of--
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government ...
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);
> any part of which is extended Federal financial assistance.

The parties do not contest that the State of Texas receives federal aid. The Secretary, however, asserts that the state's receipt of ***427** federal funds does not suffice to bring him within §504 in the absence of evidence of receipt of such funds

by the Secretary. In response, the plaintiffs maintain that the Secretary "stipulated" in district court that he is subject to §504 and thus is precluded from arguing that the plaintiffs failed to state a claim against him under that section. We agree with the Secretary.

First, a defendant's stipulation that he is subject to a claim is controlling only if the plaintiff has first alleged the facts that establish that claim. A defendant cannot stipulate to a claim that is defective as a matter of law. *See United States v. John J. Felin & Co.*, 334 U.S. 624, 640, 68 S.Ct. 1238, 1246, 92 L.Ed. 1614 (1948) (stating that court will disregard parties' stipulation as to "facts," even if accepted and applied by court below, "if the stipulation obviously forecloses real questions of law"). Second, even if the plaintiffs had asserted that the Secretary received federal financial assistance, they still cannot show that he stipulated to this point. Indeed, Warren Thomas Harrison, Deputy Assistant Secretary of State of Texas for Elections, testified on cross-examination that the Secretary "never receive [s] federal money," and that the Secretary "get[s] no federal money." In addition, in his closing argument at the liability phase of the trial, the Secretary averred that the plaintiffs have no cause of action under §504 because "the Secretary of State doesn't receive any federal money."

We have held that to state a §504 claim a plaintiff must allege that the specific program or activity with which he or she was involved receives or directly benefits from federal financial assistance. *Brown v. Sibley*, 650 F.2d 760, 767-71 (5th Cir. Unit A 1981). Certainly, a plaintiff may not predicate a §504 claim against a state actor on the mere fact that the state itself obtains federal money. *See id.* at 767 ("The State of Mississippi, for example, receives 'federal financial assistance,' in the generic sense of those words, but no one would contend that section 504 therefore reaches all proprietary and governmental

activities of the State of Mississippi."). Here, the plaintiffs have not even argued that the Secretary receives federal financial assistance -- let alone presented any evidence on this point. Therefore, the plaintiffs have failed to state a claim under §504 against the Secretary.

C

Last, the Secretary argues that the district court erred in holding that he violated the ADA by breaching a duty to ensure that local election authorities comply with the ADA. As noted above, we review the district court's conclusions of law de novo, *Chandler*, 958 F.2d at 89, and the district court's factual findings for clear error. *Henderson*, 55 F.3d at 1068.

Based on scattered provisions of the Texas Election Code, the district court found that the Secretary had a duty to warrant that local election authorities followed the ADA. Relying on Texas Election Code §§31.003[5] and 31.005,[6] for example, the

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[5] Section 31.003 provides: The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws.

[6] Section 31.005 states:

> (a) The secretary ... may take appropriate action to protect the voting rights of citizens of this state from abuse by the authorities administering the state's electoral processes.
>
> (b) If the secretary determines that a person performing official functions in the administration of any part of the electoral process is exercising the powers vested in that person in a manner that impedes the free exercise of a citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply,

district court concluded that the Secretary is responsible for ensuring ADA compliance throughout state elections because the Secretary is "the person who[m] all political subdivisions in ***428** Texas call for advice and the person who bears the responsibility for uniformity in the various voting systems in use throughout the state." The district court interpreted §31.005 as charging the Secretary with protection of voting rights in Texas and found the Secretary responsible for inspecting and validating proposed voting systems. In sum, the district court determined that "[t]he Secretary does not afford blind voters and/or mobility impaired voters an equal opportunity to participate in, or benefit from, the State's voting program that is equal to that accorded voters who are not disabled."

Title II of the ADA provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Thus, to establish a violation of Title II, the plaintiffs here must demonstrate: (1) that they are qualified individuals within the meaning of the Act; (2) that they are being excluded from participation in, or being denied benefits of, services, programs, or activities for which the Secretary is responsible, or are otherwise being discriminated against by the Secretary; and (3) that such exclusion, denial of benefits, or discrimination is by reason of their disability. The Secretary does not dispute that the plaintiffs are qualified individuals within the meaning of the ADA or that he is a public entity for purposes of the statute. The Secretary, however, asserts that he has not denied the

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the secretary may seek enforcement of the order by temporary restraining order or a writ of injunction or mandamus obtained through the attorney general.

plaintiffs the benefit of a program for which he is responsible.

In *Bush v. Viterna*, 795 F.2d 1203 (5th Cir.1986), a class of prisoners sued the Texas Commission on Jail Standards under 42 U.S.C. §1983, based upon county jail conditions that allegedly violated the Constitution. The plaintiffs claimed, under a theory of "supervisory liability," that the Commission's failure to discharge its state law-imposed duties caused the constitutional violations. The plaintiffs argued that if the Commission had followed its state law obligations to promulgate regulatory standards and enforce those standards, local officials would have ensured that conditions and activities in county jails did not violate the Constitution.

We analyzed the Commission's state law duties, and found that the Commission's purpose was to remedy inadequacies in county jail conditions. We also concluded that the Commission was required to promulgate standards, but was merely authorized to enforce those standards by order or by filing suit against noncomplying counties. *Id.* at 1205. We observed that when a federal right is deprived through state action, the court must turn to state law to determine which state actor is legally responsible for the violation. "States have virtually complete freedom to decide who will be responsible for such tasks, and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out." *Id.* at 1209. We found that the Commission "simply does not appear to have any state-imposed legal duty to correct jail violations or noncompliance that it becomes aware of." *Id.* at 1208. Thus, we found that the prisoners did not state a claim against the Commission under §1983.

The plaintiffs' claim in Bush is analogous to the plaintiffs' claim here that the Secretary has a duty to ensure compliance with the ADA with regard to Texas elections. Following Bush, we look to Texas law to determine whether responsibility for

the violations the plaintiffs allege can properly be attributed to the Secretary.[7]

Review of the provisions of the Texas Election Code that refer to the Secretary's ***429** role in elections reveals that most give discretion to the Secretary to take some action. *See, e.g.*, §31.005(a) (stating that the Secretary "may take appropriate action to protect the voting rights of the citizens ... from abuse ..."); §122.001(c) (noting that the Secretary "may prescribe additional standards for voting systems ..."); §122.002 (providing that the Secretary "may inspect at any time ... a voting system ..."); §122.003(a) (stating that the Secretary "may prohibit the use" of a voting system that does not comply with applicable standards). Provisions merely authorizing the Secretary to take some action do not confer a legal duty on him to take the contemplated action. *See Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 687 (Tex.App.1996, writ denied) ("The word 'may' means possibility, permission, liberty, or power; it does not indicate a mandatory requirement."). In the absence of such a duty, the Secretary cannot be held responsible for a failure to exercise his discretion.

The Texas Election Code does contain some provisions

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[7] During the bench trial, the district court received extensive evidence regarding the decentralized nature of the Texas election system. Specifically, although the Texas Election Code designates the Secretary the chief elections official in Texas, the Secretary does not conduct elections. Rather, the state's 3,000 or so political subdivisions run general and special elections, while the political parties conduct primary elections. In addition, the Secretary does not pick polling sites for elections. Instead, counties and political subdivisions select the location of polling places for general and special elections; county chairs of political parties select polling sites for primary elections. The Secretary's approval is required only if a local party seeks to use a site other than an available county-designated polling place.

requiring the Secretary to take action with respect to elections. Specifically, §31.003 states that the Secretary

> shall obtain and maintain uniformity in the application, operation, and interpretation of [the Texas Election Code] and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on [the Texas Election Code] and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws.

Moreover, §31.004 provides that the Secretary

> (a) ... shall assist and advise all election authorities with regard to the application, operation, and interpretation of this code and of the election laws outside this code.
>
> (b) The secretary shall maintain an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties.

Whether these sections impose a duty on the Secretary to ensure compliance with the ADA throughout Texas turns on whether the phrase "election laws outside this code" includes the ADA.

The Texas Code does not define "election laws," and we have found no case construing this phrase.[8] Thus, we first look

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[8] In *United States v. State of Texas*, 422 F.Supp. 917, 921 (S.D.Tex.1976), dismissed, 430 F.Supp. 920 (1977), a three-judge court held that the United States stated a cause of action against the Secretary for allegedly "permitt[ing] local election officials ... to apply different and more stringent voter registration standards" to certain black students in violation of the Constitution and certain federal voting provisions. In so holding, the court relied on a predecessor statute to §31.003 which required the Secretary "to

to the ordinary, contemporary, common meaning of "election laws." *See Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979) (noting that it is a "fundamental canon of statutory construction ... that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). We think that the common meaning of "election laws" is laws that specifically govern elections, rather than generally applicable laws that may affect elections. If the Texas legislature wanted §31.003 to cover the latter, we doubt that it would have inserted the adjectival modifier "election" directly before the noun "law." By forming an open compound phrase such as "election law," the Texas legislature meant "a combination of separate words that are so closely related as to constitute a single concept." Chicago Manual of Style §6.33 (14th rev.ed. 1993). An "election district," for instance, is not a district devised for many functions, including elections; it is "a district ***430** created for the purposes of elections." 5 Oxford English Dictionary 116 (2d ed. 1989). Moreover, an "election board" is not an agency that carries out all the responsibilities of a municipality, including elections; it is an agency "charged with the conduct of elections." Black's Law Dictionary 519 (6th ed.1990).

This analysis suggests that the ADA is not an election law. First, the ADA does not include even a single provision

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obtain and maintain uniformity in the application, operation and interpretation of the election laws."

A few months later, though, the court decided that, under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), it would abstain from ruling on the case and thus dismissed the United States' complaint. *Pullman* requires a federal court to abstainwhen state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary.

specifically governing elections. On the contrary, the statute never refers to elections. Indeed, the statute only mentions voting once, and that is in the "findings and purpose" section. This section, 42 U.S.C. §12101(a)(3), notes that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services...." The mere mention of the word "voting" here does not transform the ADA into an "election law." Such a tangential allusion is insufficient to impose on the Secretary the rather extraordinary duty of ensuring that local election officials interpret and apply the ADA uniformly. *Cf. Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 19, 101 S.Ct. 1531, 1541, 67 L.Ed.2d 694 (1981) (explaining that "bill of rights" section of Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6010, "is simply a general statement of 'findings' and, as such, is too thin a reed to support the rights and obligations read into it by the court below").

Second, as a general civil rights statute, the ADA involves every area of law.[9] If the ADA is construed as an "election law," then it presumably could also be called an employment law, housing law, transportation law, and so on. However, we do not think that the common, ordinary meaning of "election laws" includes a law that can be characterized in so many different ways. Rather, "election laws" only covers laws that specifically relate to elections, such as the Voting Rights Act of 1965, 42 U.S.C. §§1972-1973, or the Voting Accessibility for

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[9] The ADA's stated purpose is to eliminate discrimination against disabled people and provide enforceable standards addressing discrimination against disabled people. 42 U.S.C. § 12101(b)(1), (2).

the Elderly and Handicapped Act, 42 U.S.C. §1973ee-1.[10]

Third, if the Secretary is responsible for guaranteeing that local election officials comply with the ADA, then presumably he would also have a duty to warrant that these officials follow every other general civil rights statute that could touch on elections. These statutes would include, among others, the Civil Rights Act of 1870, 42 U.S.C. §1981; the Civil Rights Act of 1871, 42 U.S.C. §1983; the Ku Klux Klan Act of 1871, 42 U.S.C. §§1983, 1985, and 1986; the Civil Rights Act of 1964, 42 U.S.C. §§2000a, 2000d, and 2000e; the Education Amendments of 1972, 20 U.S.C. §1681; the Age Discrimination Act, 29 U.S.C. §623; the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301; and various amending statutes such as the Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 Stat. 28 (1988). In addition, the Secretary would need to ensure that local election officials follow other generally applicable laws which could pertain to elections, such as statutes dealing with littering, zoning, fire safety, and so on. We do not believe that the Texas legislature intended §31.003 to require the Secretary to provide "detailed and comprehensive written directives and instructions relating to and based on" these statutes, at least to the extent that they do not specifically pertain to elections.

In sum, we conclude that the phrase "election laws outside this code" only encompasses laws that specifically govern elections, not generally applicable laws that might cover some aspect of elections. Thus, neither §31.003 nor §31.004 imposes a duty on the Secretary to ensure statewide compliance ***431** with the ADA by the political subdivisions that administer

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[10] Note that "election laws" could very well apply to specific election provisions that form part of a more general civil rights statute. *See, e.g.*, 42 U.S.C. § 1971 (voting rights provisions of the Civil Rights Act of 1964).

elections in Texas.[11]

Two other provisions in the Texas Election Code place responsibility on the Secretary for approval of voting systems and equipment used in Texas elections. Section 122.031 states that "[b]efore a voting system or voting system equipment may be used in an election, the system and a unit of the equipment must be approved by the secretary of state...." Section 122.038 provides that the Secretary "shall approve the system or equipment" after reviewing reports on the system or equipment prepared by designated examiners and determining that it "satisfies the applicable requirements for approval."

The plaintiffs maintain that the Secretary has violated the ADA because he has not approved equipment accessible to blind voters. The plaintiffs construe §§122.031 and 122.038 as obliging the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters. The plaintiffs do not, however, specify where in §§122.031 and 122.038 they find this expansive duty, particularly in the absence of any evidence that the Secretary has refused approval of voting equipment that satisfies the plaintiffs' desires. The plaintiffs' assertion that a voting machine for blind voters exists does not prove that the Secretary violated the ADA because the plaintiffs do not allege -- let alone prove --

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[11] The plaintiffs maintain that Deputy Assistant Secretary of State Ann McGeehan "conceded" in her deposition that the ADA is an "election law" for purposes of Texas Election Code §31.003. However, we review all issues of statutory interpretation de novo, *Vinson & Elkins v. Commissioner of Internal Revenue*, 7 F.3d 1235, 1237 (5th Cir.1993), and are not bound by the district court's construction of a statute--let alone a party's. Moreover, review of McGeehan's deposition testimony demonstrates that, rather than conceding that the ADA is an "election law," McGeehan was unsure whether it was.

that they presented any voting machine to the Secretary or that he failed to approve such a machine. Perhaps the plaintiffs could state a claim under the ADA if they demonstrated that the Secretary wrongly refused to approve such equipment after it was presented to him for approval. However, the record does not reveal that the Secretary has considered any voting equipment that "satisfies the applicable requirements" and then failed to permit it. As a result, the plaintiffs have not demonstrated the Secretary's responsibility for the alleged ADA violations.

With regard to mobility-impaired voters, we note that §43.034 of the Texas Election Code places responsibility for accessibility of polling places to the elderly and physically handicapped on the "commissioners court [s]" and the "governing body of each political subdivision that holds elections." The district court stated that §43.034 imposes a statutory duty on local political subdivisions, but that the statute is unclear about how it is enforced. Without explanation, the district court concluded that it "is of the opinion that the final enforcer of this section is the Secretary of State." Thus, the district court found that the Secretary violated the ADA because some buildings used as polling places are not accessible to mobility-impaired voters.

We disagree with the district court's conclusion. Section 43.034 directs local election officials, not the Secretary, to ensure accessibility of polling places to elderly and physically handicapped voters. However, since §43.034 is clearly an "election law," we note that §31.003 commands the Secretary to obtain and maintain uniformity in the application, operation, and interpretation of §43.034. This means that the Secretary has a duty to maintain uniformity in the operation of a statute that requires local election officials to ensure the accessibility of polling places.

In this regard, the plaintiffs assert that local election

officials implement § 43.034 differently and that the Secretary has not issued "detailed and comprehensive written directives and instructions" suggesting that the officials administer that section in a particular way. To allege an ADA violation, though, the plaintiffs must also maintain, among other things, that they are being denied the benefit of a service for which the Secretary is responsible. Here, the service the Secretary has to perform is obtaining the uniform operation of §43.034. While the plaintiffs may receive a benefit from the accessibility mandate of §43.034, they do not receive any ***432** benefit from the uniformity of this mandate. For instance, assume that local election officials interpret the accessibility mandate differently. Some officials believe that §43.034 requires them to provide special scooters to ferry handicapped voters from the parking lot to the polling place; others disagree. The Secretary could carry out his duty under §31.003 either by informing local election officials that §43.034 does not compel the provision of special scooters or by directing local officials to offer such scooters. In other words, the Secretary can ensure uniformity by acting either to increase or decrease accessibility on the margin; uniformity in and of itself confers no benefit on the disabled. Thus, we determine that while the Secretary has a state-imposed legal duty to ensure the uniformity of the application, operation, and interpretation §43.034, this uniformity -- without more -- cannot be a "benefit" to the plaintiffs for purposes of the ADA and the alleged denial of uniformity cannot be an example of discrimination under the ADA. Accordingly, the Secretary cannot be held liable for violation of the ADA because some polling places are inaccessible to mobility-impaired voters.

Finally, §35.105 of the ADA implementing regulations requires a public entity to "[e]valuate its current services, policies, and practices, and the effects thereof ... [and] proceed

to make the necessary modifications." 28 C.F.R. §35.105(a). The plaintiffs argue that the Secretary violated the ADA by failing to perform this "self-evaluation." The plaintiffs maintain that "[t]he Secretary's abject failure ... most notably by failing to prepare a self-evaluation plan, played a pivotal role in ensuring that, as of the trial in this case, no efforts had been made in Texas to adapt or invent voting systems that would provide secrecy of the ballot for voters who are blind...." The plaintiffs describe §35.105 as creating a "duty" on the part of the Secretary "to take the initiative and explore, through all means reasonably available, solutions to the discrimination faced by voters who are blind."

Central to the plaintiffs' argument here is the premise that §35.105 requires the Secretary to evaluate the practices of every electoral subdivision in Texas. We find such an interpretation of the regulation unreasonable. To the contrary, we read §35.105 as merely requiring the Secretary to evaluate his department, an evaluation the Secretary performed. In fact, even the plaintiffs' counsel admitted before the district court that the Secretary performed an internal self-evaluation.

In sum, the Secretary has no duty under either Texas law or the ADA to take steps to ensure that local election officials comply with the ADA. While the Secretary has a duty to approve certain voting equipment, the plaintiffs have failed to allege facts suggesting a breach of that duty. In addition, while the Secretary has a duty to maintain uniformity in the administration of §43.034 and arguably breached that duty, he could not have denied any benefit to the plaintiffs. Therefore, we determine that the plaintiffs have failed to state a claim under the ADA against the Secretary.

III

Based on the foregoing, we REVERSE the judgment of the district court and RENDER judgment in favor of the Secretary of State of Texas.

Margarita LIGHTBOURN, et al.,

v.

COUNTY OF EL PASO, TEXAS, et al.,

v.

Antonio GARZA, Jr., Secretary of State of Texas.

No. EP-94-CA-299-DB.

904 F.Supp. 1429

United States District Court,

W.D. Texas, El Paso Division.

Nov. 22, 1995.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BRIONES, District Judge.

On this day, the Court enters its Findings of Fact and Conclusions of Law in the above-captioned cause. A bench trial was held beginning June 12, 1995, and continued over the next few days. This case deals with the most fundamental element of a representative democracy, the right and privilege of voting. This is a case of first impression regarding the applicability of the Americans with Disabilities Act (herein "ADA") codified at 42 U.S.C. § 12101 et seq., to state voting regulations. Plaintiffs have likened the present treatment of disabled voters in the State of Texas to "separate but equal" status. Predictably, the state vehemently denies this characterization. After a lengthy period of research and careful consideration, the Court is of the opinion that the cause should be decided as set forth below.

I.

The procedural history of this case is somewhat convoluted. Plaintiffs' original Complaint was filed in this Court on September 9, 1994. Five disabled Plaintiffs sued the County of El Paso, the El Paso County Democratic Party and the El Paso

County Republican Party. The County of El Paso filed a Third-Party Complaint against the Secretary of State of Texas in his capacity as chief election officer of the state. Plaintiffs then sought class certification and leave to amend their Complaint. Both Motions were granted. Plaintiffs' First Amended Complaint added another individual plaintiff and the Disabled Ability Resource Environment, an El Paso-based, not-for-profit Texas corporation for disabled advocacy. Also added to Plaintiffs' Complaint were direct causes of action against the Secretary of State for violations of the ADA. The class was certified as all mobility-impaired and visually-impaired voters in the State of Texas in a separate Order of the Court.

The Secretary of State changed from Ronald Kirk to Antonio Garza.[1] Court documents were changed to reflect this fact. Pursuant to a FED.R.CIV.P. 12(b)(6) motion, ***1431** the Republican Party was dismissed.[2] Soon thereafter, the Democratic Party settled with the Plaintiffs, presumably to avoid being viewed as insensitive to the disabled. Shortly before trial, the County of El Paso settled with the Plaintiffs. Thus, the sole Defendant at the non-jury trial held beginning June 12, 1995, was the Secretary of State for the State of Texas. The Court bifurcated the trial into a liability and a remedy phase. Pursuant to the Court's order in this regard, the remedy phase will only

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[1] At trial, counsel for the Secretary of State alleged that the instant action was politically motivated. The Court patiently notes that the cause was originally filed against Mr. Kirk, a Democrat, not Mr. Garza, a Republican. This change was due to an intervening election.

[2] There was no allegation that any named Plaintiff intended or ever attempted to vote in a Republican Party primary election or participate in a Republican Party precinct convention.

be held if the parties cannot reach an agreement in light of this opinion.

II.

All plaintiffs are qualified individuals with disabilities as that term is defined in the Americans with Disabilities Act. They are mobility-impaired or sight-impaired residents of El Paso County, Texas. They are all registered voters. A class of disabled voters (sight and mobility impaired) in the State of Texas was certified by this Court. The representative class members testified as to specific difficulties in voting, on election day, in El Paso County and in other counties throughout the State of Texas. This testimony was uncontroverted and unrebutted. The State pointed out that the testimony regarding voting in other counties concerned events which occurred prior to the passage of the ADA but not prior to the passage of the Rehabilitation Act or the Voting Rights Act. The State failed to point out any changes or improvements implemented since the passage of the ADA in the other counties. Further testimony was illicited regarding voting in El Paso County after passage of the ADA. The Court notes that the Rehabilitation Act and the Voting Rights Act predate the ADA. Since the ADA is not to be applied retroactively, the Court will not consider evidence of discrimination prior to the enactment of the ADA. *O'Bryant v. City of Midland*, 9 F.3d 421 (5th Cir.1993).

Defendant quotes Department of Justice Letters of Finding as a defense of the present system. The Court is not bound by a Department of Justice review or finding in any way. These letters represent the position of the Department of Justice as to the meaning of the aforementioned laws. As the parties and this Court are all too aware, at this time there is no case law which supports the propositions advanced by the Plaintiffs or the defenses raised by the Defendant.

III.

Defendant argues that the changes requested by the Plaintiff would work a fundamental change in the voting system in the State of Texas. The Court does not agree with this overly-broad statement; it would work a change in how disabled voters are treated only.

Defendant concedes that the Plaintiffs have a right to a secret ballot under Texas law, but cites the Court to two cases, *Oliphint v. Christy*, 157 Tex. 1, 299 S.W.2d 933 (1957), and *Sewell v. Chambers*, 209 S.W.2d 363 (1948), for the proposition that there are certain public interests which outweigh the individual's right to a secret ballot. Defendant alleges that a system allowing the visually-impaired to vote would raise the specter of fraud. Defendant, however, miscites these cases. Both of these cases had to do with fraud and illegal voting during an election and were brought after the conclusion of the election. Neither of these factors are present in the case- at-bar. In *Oliphint*, the Court noted that only those persons who participated in the election illegally had no right to a secret ballot and therefore those persons could be compelled by a competent tribunal to disclose for whom they voted. Those who voted legally could not be so compelled. 299 S.W.2d at 935-36. Plaintiffs argue that they have a right to a secret ballot, not that there is fraud or illegal voting. *See Wood v. State ex rel. Lee*, 133 Tex. 110, 126 S.W.2d 4 (1939) (cited approvingly in *Oliphint*, *supra*). Regardless of the warnings of Defendant, the possibility of fraud or illegal voting is just that, a possibility, and not, therefore, before the Court.

Similarly, Defendant spent considerable time discussing the cost of a system which would allow the visually-impaired to vote. It ***1432** is Defendant's contention that cost is a public interest of such vitality as to permit the secrecy of the ballot to be ignored. The cost of providing a system which would allow

the Plaintiffs to exercise their fundamental right in secret is as speculative as the Defendant's possibility of fraud defense.[3] The Court is aware that there is an economy of scale problem faced by the state; in a "typical" ADA case the employer can show that the qualified individual can be accommodated for "X" number of dollars. The state is facing a much larger number of people to accommodate. Thus, the fact that the dollar amount seems like a large number is something of a red herring in that this number should be divided by the number of people to be benefited and the number of counties to be affected. In that context, the cost does not seem quite as large.[4] Likewise, the state discussed program accessibility versus barrier removal and noted that public entities are not held to the same standard as public accommodations. Regardless, both the cost argument and the accessibility argument, like the fraud argument, are premature; what the actual remedy is to be will be determined later.

Previously, Congress addressed the problem of handicapped access in the Voting Accessibility for the Elderly and Handicapped made part of the Voting Rights Act at 42 U.S.C. §1973ee, *et seq*. Evidently, Congress did not feel that this measure was sufficient, as it revisited and specifically ad-

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[3] There was no evidence that the state had actually attempted to provide such a viable system prior to the filing of this lawsuit.

[4] The Court notes that the State of Texas has expended considerable resources in seeking to avoid affording its handicapped citizens equal treatment in their right to vote under the law. Had these same resources gone to development of a system for the disabled or to enforce already existing laws, a lawsuit may not have been necessary. The state could also have spent the time to come to an agreement with Plaintiffs and saved a great deal of time and money for this Court and the state.

dressed the same issue six years later in the ADA. It is this Court's express finding that the ADA and the Voting Rights Act are to be read in conjunction.

In the ADA, Congress found that:

> (2) historically, society has tended to isolate and segregate individuals with disabilities and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as ... voting and access to public services.... 42 U.S.C. §12101(a) (emphasis added).

Moreover, §12132 of the ADA requires that:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

Section 504 of the Rehabilitation Act codified at 29 U.S.C. §794 states:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(8) of this title, shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

There is no doubt that Plaintiffs have a right to vote and may vote legally. They are otherwise qualified to participate in the activity of voting in Federal elections.

Thus, having determined that the Plaintiffs have a constitutional right to vote, a right to a secret ballot and that the reasons advanced by the state for failure to observe this right is at best,

speculative, the question before the Court is whether this failure is in violation of these acts.

It is undisputed that the Secretary of State is a public entity subject to Title II of the ADA, 42 U.S.C. §12131-34 and Section 504 of the Rehabilitation Act, 29 U.S.C. §794. The Secretary of State is the chief elections officer for the state, the person who all political subdivisions in Texas call for advice and the person who bears the responsibility for uniformity ***1433** in the various voting systems in use throughout the state. "The secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code." V.T.C.A. Election Code §31.003 (Vernon's 1986) (emphasis added). Section 31.005 of the same code charges the Secretary of State with protection of voting rights:

> (a) The secretary of state may take appropriate action to protect the voting rights of citizens of this state from abuse by the authorities administering the state's electoral processes.
>
> (b) If the secretary determines that a person performing official functions in the administration of any part of the electoral process is exercising the powers vested in that person in a manner that impedes the free exercise of that citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply, the secretary may seek enforcement of the order by temporary restraining order or a writ of injunction or mandamus obtained through the attorney general.

The first requirement of any approved system of voting in Texas is that the system must "preserve the secrecy of the ballot" V.T.C.A. Election Code §122.001(a)(1) (Vernon's 1995). Once again, the Secretary of State is responsible for inspecting and validating a proposed voting system. Handi-

capped voters presently take an assistant or are to be assisted by election judges, one from each party in the case of a general election. The Secretary of State concedes that no present system assures the secrecy of the ballot for visually-impaired voters other than enforcement of election laws making it a crime to disclose how someone voted, which would be the same enforcement method afforded non-handicapped voters. Likewise, under the present system there is no means by which a visually-impaired voter may verify in his own mind that his ballot is properly marked. It is the Secretary of State who must act to end any discrimination.

Testimony at trial illicited a great deal of "how to" vote evidence regarding visually-impaired voters, but not necessarily much "where to" vote evidence regarding mobility-impaired voters. Section 43.034 of the Texas Election Code requires that buildings used as polling places be accessible to the elderly and physically handicapped. This section mirrors the language in the Voting Rights Act. The Texas statute places the duty to follow the statute on the local political subdivision. The law is unclear as to how this statute is enforced. Nevertheless, the Court is of the opinion that the final enforcer of this section is the Secretary of State.

Finally, it is the Court's explicit finding that accommodating handicapped voters does not in any way affect the manner in which non-handicapped citizens currently vote, that is, it does not require modifications which would fundamentally alter the nature of the vote for all other citizens. 28 C.F.R. §35.130(b)(7).

Conclusion

With regard to the mobility-impaired voters, it would seem that the State of Texas has in place statutes which would, if enforced properly, provide for accessibility to polling places on election day. Presently, by the clear language of Texas statute,

all polling places should be handicapped accessible as accessible is defined in Texas law and in the ADA.

As to visually-impaired voters, it is clear that all voters in Texas have a right to a secret ballot and to vote on election day at their local precinct. Although on its face, the argument seems ludicrous, Defendant's contention seems to be that Texas law affords a secret ballot only if it is not too much trouble. The ADA is about equality; Plaintiffs seek to be afforded the same rights and privileges as their non-handicapped peers on election day.

The system of voting in the State of Texas does not presently comport with the Americans with Disabilities Act. The present system discriminates against the disabled. Visually-impaired voters in the State of Texas have a right to vote as would any other citizen on election day, secretly, at the precinct in which the voter lives. Mobility-impaired ***1434** voters have a right to vote with their neighbors at the local polling place. Fiery rhetoric aside, the Court notes that the Plaintiffs are willing to accept what is, in effect, "separate but equal" status at their local polling place as an improvement over their present situation. They do not ask that every voting machine be operable by handicapped persons but only that some accommodation be made for them at their neighborhood polling place with a machine designed to address their special needs. In this day of low voter turnout and general apathy in the electorate, simplifying access to the polls for a group of people with a history of political activity is in the best interest of both the state and federal government. It is their right as citizens and is required by the ADA.[5]

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[5] Walter Scott observed that "Necessity is the mother of courage, as of invention." Benjamin Franklin noted that "Necessity never made a good bargain." Both men were correct. Although it will not

Accordingly, from a preponderance of the evidence adduced at trial, the Court finds in favor of the Plaintiff and against the Defendant Secretary of State.

Finally, because the Court has found that the amount of time attorneys take to do something will expand to fill whatever amount of time granted to them by the Court, the hearing to determine the remedy in this case shall be scheduled during the week of December 18, 1995. The parties are afforded approximately thirty days to come to some agreement as to a remedy in this case. Otherwise, the Court will hear testimony and fashion a remedy.

SO ORDERED

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be easy, Texas has an opportunity to lead the nation into a world of equality for the handicapped and the disabled regarding the most cherished right and greatest responsibility in any democracy.

Margarita LIGHTBOURN, et al.,

v.

Antonio GARZA, Jr.,
Secretary of State for the State of Texas.
No. EP-94-CA-299-DB.
928 F.Supp. 711
United States District Court,
W.D. Texas, El Paso Division.
June 10, 1996.

FINAL JUDGMENT

BRIONES, District Judge.

On this day, the Court considered the above-captioned cause. A remedy hearing was held at which the State failed to present any alternative whatsoever to the remedy proposed by the Plaintiffs. After due consideration, pursuant to Fed.R.Civ.P. 58, the Court enters this final judgment. The judgment and the findings and conclusions contained herein supplement those Findings of *712 Fact and Conclusions of Law entered on November 22, 1995.

This Judgment is entered against Antonio Garza, in his capacity as the Secretary of State for the State of Texas (herein "Secretary") and all his employees, agents, persons acting at his direction or request, and the Secretary's successors in office, for and on behalf of Plaintiffs and the class members, who are blind[1] voters and voters with mobility impairments in the State of Texas.

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[1] "Blind" includes persons who possess severe visual impairments. Likewise, "mobility-impaired" includes those persons who require a wheelchair, walker, braces, crutches or the assistance of others in getting around. The impairments may be as a result of accident, because of age or since birth.

Plaintiffs filed this suit, alleging violations of the Americans with Disabilities Act ("ADA")[2] and the Rehabilitation Act of 1973,[3] ("Section 504"). Plaintiffs prevailed against the State of Texas and the Secretary after trial on liability.[4]

Notice was given to the class pursuant to earlier order of Court as to the nature and substance of the Judgment, and no class member has objected. Additionally, no class member opted out of the class or formally objected to any step or phase of this litigation. The Court is convinced that this Judgment is in the best interests of the class.[5]

SUPPLEMENTAL FINDINGS OF FACT

1. Plaintiffs and the class members are voters in Texas.
2. A part from the legal authority he exercises over the

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[2] 42 U.S.C. §12101 *et seq.*

[3] 29 U.S.C. §791 *et seq.*

[4] At the liability phase of this trial, it was this Court's conclusion that the ADA and Section 504 apply to elections. This issue was, as the Court noted in its November opinion, central to the case. Counsel has apparently misunderstood the import of this finding; until such time as this decision is overturned on appeal, this issue is resolved as a matter of law. Perhaps this misunderstanding explains the Secretary's failure to submit a proposed remedy.

[5] The Court notes that a class member may essentially "opt out" of the class at any time by choosing not to use any of the remedies effectuated by this decree, and choosing instead to vote according to the current options available, which will continue in effect in addition to this judgment. Similarly, nothing in this decree prevents any class member from proceeding on their own against local election officials for non-compliance with Section 504 or the ADA.

State's voting program[6] as its Chief Elections Officer, the Secretary, by custom and practice, also exercises considerable other, informal authority over the local election authorities throughout the State (for example, providing legal guidance, advice, counsel and training, and serving as the conduit for information about federal and state laws that have applicability of any nature to elections). This is true with regard to implementation and enforcement of both the ADA and Section 504.

3. Similarly, by virtue of his office, as well as custom and practice, the Secretary has significant persuasive power he can exercise to assure compliance with the ADA and Section 504 by local election authorities of political subdivisions throughout the State in conducting elections. The Secretary has chosen not to exercise this power.

4. The Secretary has provided limited and inadequate advice and training to local election authorities regarding implementation of Title II of the ADA insofar as it pertains to the State's voting programs and services. The Secretary presented no evidence that he ever attempted to provide advice or training to local election authorities regarding implementation of Section 504 insofar as it pertains to the State's voting programs and services.

5. The Secretary did not conduct a self-evaluation of the State's voting program and the effects of current policies and practices, statewide and by ***713** local election authorities, pursuant to the ADA or Section 504, to determine if they met the requirements of 28 C.F.R. §35.105(a) and its counterpart Section 504 regulations, with regard to access to the secret

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[6] "Program," in this Judgment includes "program," "services," and "activities," as those terms are used in the ADA and Section 504.

ballot by mobility-impaired voters and blind voters, whether for primary, general, or special elections.

6. The Secretary failed to provide an opportunity to interested persons, including individuals with disabilities and organizations representing individuals with disabilities, to participate in such a self-evaluation process pursuant to 28 C.F.R. §35.105(b).

7. The Secretary failed to prepare or encourage the preparation of a transition plan where necessary, by his office or by local election authorities, pursuant to the ADA, with respect to mobility-impaired voters and blind voters.

8. Even though, by law, the Secretary funds the election day expenses for political primaries (currently in the range of $10-$12 million), he has not conducted a self-evaluation, pursuant to ADA or Section 504, with regard to mobility-impaired voters and blind voters, in primary elections.

9. The Secretary has not prepared, or assured the preparation of, a transition plan where necessary, pursuant to the ADA, with respect to mobility- impaired voters and blind voters, in primary elections.

10. The Secretary has substantial powers to investigate abuses of the rights of Texas voters and to eradicate such abuses where found.

11. Despite having such powers and despite knowledge of continued abuses of the voting rights of disabled Texans since the passage of the ADA and the Rehabilitation Act of 1973, the Secretary has inadequately utilized his powers to eradicate discrimination against disabled voters.

12. Substantial abuses of the rights of disabled voters have existed in Texas historically, and continue to exist to this day. Included among those rights are the rights of significant numbers of mobility-impaired Texans to adequately access

individual polling sites, and the right of blind Texans to vote by private and secret ballot.

13. The Secretary has failed to explore the possibility of ADA and Section 504 compliance with reasonable modifications and accommodations in existing voting systems and mechanisms for persons with mobility impairments or who are blind.

14. With regard to primary elections, the Secretary permits political parties to choose and use polling sites that are inaccessible to persons with disabilities and permits them to choose and use elections systems that do not provide a secret ballot for persons who are blind.

15. Despite having the sole authority to do so, the Secretary has never established or required the use of any ADA or Section 504 criteria by statutory examiners evaluating and certifying voting systems in Texas in order to preserve secrecy of the ballot for blind voters.

16. Despite having the ability and authority to do so, the Secretary has never established or required the use of any criteria by statutory examiners in approving election balloting systems that would facilitate and assure use of the secret ballot by mobility-impaired voters, and especially by blind voters.

17. Despite having the ability and authority to do so, the Secretary has not undertaken any effort to encourage the commercial development of voting systems for blind persons, or to modify other systems in order to accommodate blind persons.

18. The Secretary has undertaken no effort to encourage development of voting systems for blind persons, or to modify other systems, to preserve the secrecy of their ballot. ***714**

19. Because of the Secretary's failures, noted above, there is no balloting system in use at this time anywhere in the State

that assures blind persons the right to cast a secret ballot.

20. The Secretary's proffered and recommended accommodation for voters who are blind, namely, assistance by another in reading aloud and marking the ballot, often results in embarrassment and sometimes humiliation for blind voters and results in discouraging them from exercising the franchise, and denies them the right to secrecy of the ballot.

21. Although having the ability and authority to do so, the Secretary has never commenced any enforcement action against parties or entities that provide inaccessible polling places to voters who have mobility impairments, even though he is aware of many such inaccessible polling sites.

22. The record shows widespread non-compliance throughout Texas with the physical accessibility requirements of the ADA and Section 504 so that persons with mobility impairments generally are impeded and discouraged from exercising their right to vote.

23. The Secretary has not undertaken any systematic follow-up action to encourage making such non-conforming polling places accessible to mobility- impaired persons.

24. The Secretary's failures, noted above, perpetuate discrimination by local election authorities in the State's voting program with regard to mobility- impaired voters and blind voters, by ignoring his statutory duty to provide them with guidance in uniformly implementing Title II of the ADA.

25. Prior to the filing of this case, neither the Secretary nor his designee had ever raised or claimed the defense of undue burden or fundamental alteration under the ADA in a written statement, as required by federal ADA regulations. Nor did the Secretary, in declining to modify the program to preserve secrecy of the ballot for blind voters, consider all reasonable resources available for use in funding and operating the State's voting program. 28 C.F.R. §35.150(a)(3).

26. The Secretary has discriminated, and continues to discriminate, against Plaintiffs and members of the class on the basis of their disabilities.

27. The Secretary has failed, and continues to fail, to reasonably accommodate Plaintiffs and the class members, and their disabilities, in the exercise of the franchise and secret ballot.

28. The Secretary has failed, and continues to fail, to make reasonable modifications and accommodations in the State's voting program for Plaintiffs and the class members, thereby effectively precluding them from the total enjoyment of the franchise and secret ballot.

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Court has jurisdiction over the case, and this case is ripe for review.

2. Plaintiffs and the class members are qualified persons who have disabilities, records of disabilities, and/or are regarded as having disabilities, as those terms are defined by the ADA and Section 504.

3. Defendant Secretary is a public entity, subject to Title II of the ADA and Section 504.

4. Title II of the ADA and Section 504 are federal laws that affect elections in Texas. Both laws are broader than the Voting Rights Act of 1985 and, as such, supersede that Act to the extent that it conflicts with either the ADA or Section 504. The same is true with regard to the Texas Elections Code.

6 [sic]. The right to cast a secret ballot is a fundamental constitutional right in Texas, and the Secretary, as Chief Elections Officer for the State, oversees the voting program that assures *715 and effectuates that right, which is an intrinsic part of the voting program in Texas.

7. The Secretary has joint responsibility with the State's

local election authorities in assuring compliance with the ADA and Section 504 in conducting elections.

8. The voting program conducted by the Secretary includes: examination, inspection, and approval of voting systems; preparation of software; duty to maintain uniformity in application of Title II of ADA; duty to protect voters with disabilities from impediments to free exercise of voting rights with regard to the secret ballot; funding of primary elections; and provision of funding for voter registration activities. 28 C.F.R. §102(a).

9. With regard to party primaries, the Secretary allows the political parties to select polling sites that have the effect of excluding individuals with disabilities from participating in, or enjoying the benefits of, the State's voting program, and subjecting them to discrimination, with the effect of substantially impairing the accomplishment of the State's voting program with respect to persons who have disabilities. 28 C.F.R. §35.130(b)(4)(i)-(ii).

10. The Secretary has the duty to ensure uniform application, operation, and interpretation of Title II of the ADA with respect to local election authorities in Texas. He may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that perpetuate the discrimination of another public entity, if both agencies are subject to common administrative control or are agencies of the same State. 28 C.F.R. §35.130(b).

11. The Secretary administers a licensing and certification system, namely, for approving voting systems to be used by local election authorities, which illegally subjects persons who are blind to discrimination because of their disability. 28 C.F.R. §35.130(b)(6).

12. The Secretary's proffered and recommended accommodation for voters who are blind, namely, assistance by

reading aloud and marking the ballot, is not a reasonable modification of his policies, practices, or procedures, as required by the ADA to avoid discrimination on the basis of disability, by his prior approval of voting systems, despite the fact that they failed to provide secrecy of the ballot for blind voters while providing secrecy of the ballot for all other voters. 28 C.F.R. §35.130(b)(7).

13. The Secretary does not afford blind voters and/or mobility-impaired voters an equal opportunity to participate in, or benefit from, the State's voting program that is equal to that accorded voters who are not disabled.

14. Modification of the current policies, practices, and procedures that result in the denial of the secrecy of the ballot for blind voters would not cause a fundamental alteration in the nature of the State's voting program. There is absolutely no requirement that the method by which sighted and non--handicapped Texans vote change in any way. Rather, a reasonable modification would further the participation in, and benefit from, such program by blind voters.

Conclusion

It is the Court's intention to have an ADA-compliant voting system in place for the next national election in the year 2000. Since the landmark voting rights cases of the 1960's, there have been sweeping changes in the conduct of elections in this state. In the case-at-bar, the group seeking protection from polling place discrimination is relatively small, but the size or nature of a group does not affect the individual civil rights of that group; that is the American experience.

To this end, and at the specific request of the Secretary, the Court has greatly extended the deadlines for compliance. The deadlines contained herein should be more than ***716** sufficient to accomplish the elimination of discrimination on the part of

the Secretary. This Order also includes a great deal of leeway with regard to both time and method of implementation.

Finally, it should be noted that the Court has jurisdiction only over the Secretary in this case. Therefore, only those matters over which the Secretary has direct control are addressed. The ruling of this Court does not directly burden local election officials. However, the Court does acknowledge that, as in many other cases, changes at the top will work changes at the bottom. This holding will, among other things, remove a major impediment to a local voting authority seeking to comply with the ADA, namely the failure of the Secretary to approve an ADA-compliant system.

Accordingly, it is ORDERED, ADJUDGED, and DECREED as follows:

A. The Secretary, after December 31, 1996, shall approve no new voting system that is not ADA-accessible and does not preserve secrecy of the ballot for blind voters. ADA criteria, including secrecy of the ballot for blind voters, shall be devised by the Secretary, promulgated in the Texas Administrative Code, and distributed to voting systems examiners and vendors for use in evaluating voting systems. Such standards shall be specific in all particulars.

In addition, the Secretary shall send a letter to all vendors of voting systems in Texas approved in the last five years, informing them that no new or modified voting systems will be approved that are not ADA-accessible and that do not preserve secrecy of the ballot for blind voters.

B. The Secretary shall prepare detailed and comprehensive written directives, guidelines, and instructions, as appropriate, relating to, and based, on Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12131(A), and its implementing regulations contained in 28 C.F.R. Part 35, and, within eighteen months of the date of this judgment, distribute

these directives, guidelines, and instructions to all local authorities performing official functions in the administration of the State's voting program, including, but not limited to, all the counties, political parties, school districts, municipalities, and special districts of the State. These directives, guidelines, and instructions will include, but are not limited to:

1. Guidelines and instructions that voting systems purchased after December 31, 1997, must be accessible, as required by the ADA, to mobility- impaired voters and blind voters (included in this directive will be an explicit instruction that voting systems must preserve secrecy for blind voters).

2. Guidelines and instructions that on or before December 31, 1998, current voting systems must be modified and made accessible, as required by the ADA, to mobility-impaired voters and blind voters (included in this directive will be an explicit instruction that voting systems must preserve secrecy for blind voters).

3. Guidelines and instructions that all voting systems in the State of Texas must be accessible, as required by the ADA, to mobility-impaired and blind voters on or before December 31, 1999, (included in this directive will be an explicit instruction that voting systems must preserve secrecy for blind voters).

C. The Secretary shall submit all proposed directives, guidelines, and instructions contained in Sections A and B above, to the Court for review within twelve months of the date of this Judgment.

D. The Secretary shall devise a system of systematically monitoring ADA and Section 504 compliance by local election authorities in the administration of their and the State's voting program. An annual report detailing compliance of local election authorities shall be delivered, on the anniversary date

of this Judgment, to the Court throughout the duration of this Judgment.

E. Nothing in this order shall derogate defenses which individual election authorities may have under the ADA and Section 504, particularly the defense of undue burden, as to implementation of any ADA modification or accommodation for persons with disabilities. Nor shall anything in this order alter *717 the legal obligation of election authorities with regard to making their voting programs accessible to persons with disabilities and to prevent discrimination against persons with disabilities, as required by the ADA and Section 504.

F. The Court shall maintain jurisdiction over this Judgment for all enforcement purposes until the Judgment is complied with. This Judgment will bind the Secretary's successors in office, as well as all agents, employees, and those acting at the Secretary's direction or on his behalf.

SO ORDERED

Signed this 10th day of June, 1996

DAVID BRIONES
UNITED STATES DISTRICT JUDGE

FEDERAL STATUTES

42 U.S.C. §12132 (Title II of the ADA)

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

FEDERAL REGULATIONS

28 C.F.R. §35.105(a)

A public entity shall, within one year of the effective date of this part [January 26, 1992], evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent that modifications of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

28 C.F.R. §35.130(b)(1)(ii)

A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing or other arrangements, on the basis of disability ---

....

> (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.

28 C.F.R. §35.130(b)(3)(i)

(3) A public entity may not, directly or through contractual or other arrangements utilize criteria or methods of administration:

> (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.

TEXAS STATUTES

TEXAS ELECTION CODE ANNOTATED (Vernon 1997):

§122.001: Voting System Standards

(a) A voting system may not be used in an election unless the system:

(1) preserves the secrecy of the ballot;

....

(5) permits voting on all offices and measures to be voted on at the election....

§122.031: Approval of Systems and Equipment Required

(a) Before a voting system or voting system equipment may be used in an election, the system and unit of the equipment must be approved by the secretary of state as provided by this subchapter.